Supreme Court, U.S.
FILED

No. 93-~~931~~ 451 FEB 25 1994

IN THE SUPREME COURT
OF THE
UNITED STATES

OCTOBER TERM, 1993

EVELYN BROWN AND ROOSEVELT BROWN
Petitioners

vs.

UNITED STATES OF AMERICA. ET. AL.
Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. WHETHER THE TRIAL COURT WAS REQUIRED AND FAILED TO MAKE FINDINGS :

A. THAT THE BROWNS CONSENTED TO THE ILLEGAL DRUG SALES ON THEIR PROPERTY AND DID NOT TAKE REASONABLE MEANS TO STOP THEM, AND

B. THAT THE ILLEGAL ACTIVITY WAS FOR A VIOLATION OF TITLE 21 WHICH CARRIES A PENALTY OF GREATER THAN ONE YEAR.

II. WHETHER FAILURE TO RAISE AT TRIAL THAT THE FORFEITURE VIOLATED THE EXCESSIVE FINES CLAUSE OF THE EIGHTH AMENDMENT IS A FATAL PROCEDURAL DEFAULT TO APPELLATE CONSIDERATION, AND IF NOT, SHOULD THE CASE BE REMANDED TO CONSIDER THE FORFEITURE'S PROPORTIONALITY TO THE OFFENSES COMMITTED, AND THE BROWNS INVOLVEMENT IN THEM, UNDER AUSTIN V. UNITED STATES, 113 S.CT. 2801 (1993), HOLDING THE FINES CLAUSE, TO APPLY TO 21 U.S.C. §§ 881(a)(4) AND (a)(7) FORFEITURES.

LIST OF PARTIES

The parties to the *in rem* forfeiture proceeding in the Western District of Virginia, Danville Division and the Fourth Circuit Court of Appeals were:

1. All that Parcel of Land at 31 Endless Street, Martinsville, Virginia, Defendant-Petitioners,

2. Evelyn Brown and Roosevelt Brown, Claimants-Petitioners,

3. the United States of America, Plaintiff-Respondents.

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COURT FOR CONSIDERATION OF THE PROPORTIONALITY OF THE FORFEITURE TO THE OFFENSES COMMITTED, AND THE INVOLVEMENT OF THE BROWNS, IN LIGHT OF THIS COURT'S OPINION IN AUSTIN V. UNITED STATES, 113 S.CT. 2801 (1993), HOLDING THAT THE CLAUSE APPLIES TO FORFEITURES UNDER 21 U.S.C. §§ 881(a)(4) AND (a)(7).. 25

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CONSTITUTIONAL PROVISIONS

Eighth Amendment

No. 94-_____

IN THE SUPREME COURT
OF THE
UNITED STATES

OCTOBER TERM, 1993

ALL THAT PARCEL OF LAND AT 31 ENDLESS STREET, MARTINSVILLE, VIRGINIA
Defendant, Petitioner

EVELYN BROWN AND ROOSEVELT BROWN
Claimant, Petitioner

vs.

UNITED STATES OF AMERICA
Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Petitioners Evelyn Brown and Roosevelt Brown respectfully pray that a writ of certiorari be issued to review the judgment of

the United States Court of Appeals for the Fourth Circuit entered on November 2, 1993, No. 92-1609.

OPINIONS BELOW

The unpublished opinion of the United States Court of Appeals for the Fourth Circuit, affirming the order of the United States District Court for the Western District of Virginia, Danville Division, forfeiting petitioners' house to the United States of America, is reprinted in the appendix to this petition at pages A[1] - A[8]. The district court's opinion, and the Decree of Forfeiture is reprinted at pages A[10] - A[14].

JURISDICTION

The judgment from the United States Court of Appeals for the Fourth Circuit was entered on November 2, 1993. The petition for rehearing was denied on November 29, 1993. Jurisdiction of this court is invoked pursuant

to 28 U.S.C. Section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The provisions of law which are involved are:

1. the Eighth Amendment of the United States Constitution.
2. 21 U.S.C. § 881(a)(7) which grants the power to forfeit property used to facilitate the trafficking of drugs.

STATEMENT OF THE CASE

In 1990, ten to fifteen persons were indicted for drug sales to an informant, Francis Barnwell, in proximity to 31 Endless Street. Most of the buys were made primarily on Endless Street not far from the Brown residence. A few were alleged to be consummated in or on the premises. Endless and Massey streets are in an area of frequent drug transactions. Other parts of Endless Street, so called because it makes a complete circle about

two blocks on each of four sides, and the surrounding area contain "crack houses." There was a "crack house" in two apartments directly in front of the Browns' house.

Evelyn and Roosevelt Brown have lived at 31 Endless Street for their 25-year married lives. Their house is occupied with their children, at times, and always a great many of their grandchildren and other relatives are in and out of the house. The Browns denied dealing in drugs or knowledge of others doing it. The house was searched three times in three or four years-- Evelyn's person was searched once--and no drugs were found as in United States v. 7715 Betsy Bruce Lane, 906 F.2d 110 (4th Cir. 1990). Scales were found, but no cocaine residue on them was proven, also distinguishing this case from Betsy Bruce Lane. Id., at 112 The Browns see a lot of people on the street, but they claim no direct knowledge of their activities.

Roosevelt Brown has worked for Piedmont Vending for thirty years. He leaves home at

5:00 a.m. every day and returns at 4:00 p.m. He is hard of hearing, so his information derived from that sense is obviously restricted, and he is an insulin-dependent diabetic who uses scales to measure his food. When home, Mr. Brown usually watches T.V. in a den in the middle of the house or his bedroom. On Sundays, his son Michael comes over and they read the Sunday paper together. His son Larry Belcher comes over once or twice a week but he never stays overnight. Mr. Brown professed ignorance of any drug activities by his children. His children Iris, Sherry, and "Peanut" may have keys to the house.

Evelyn Brown was indicted, and acquitted of selling cocaine in connection with the underlying criminal investigation in 1990. Mr. Francis Barnwell, a police citizen informant testified that he made several drug buys, of one gram or less, from the Browns' relatives, including two from their children, and others on the public street which adjoins the

premises, and a few buys in and on the property itself. He claimed Mr. Brown observed a couple of drug sales and that Mrs. Brown, in the case in which she was acquitted, indicated her approval of a sale by her son. The trial judge, however, refused to find the Browns personally involved.

This petition concerns the in rem forfeiture action commenced on October 23, 1990, against the Browns' home. The United States filed its "Verified complaint for Forfeiture in rem", Civil Action No. 90-0052-D, in the United States District Court for the Western District of Virginia, Danville Division, against "all that lot or parcel of land located at 31 Endless Street, Martinsville, Virginia (Roosevelt Brown/Owner)". Jurisdiction and cause of action were founded upon Title 28, United States Code, Sections 1345 and 1355, and Title 21, United States Code, Section 881(a)(7) on the grounds that the subject real estate "was

used or intended to be used ... to facilitate the commission of a violation of Title 21, United States Code, Section 881 et seq. punishable by more than one year's imprisonment." The violation was alleged to be illegal drug trafficking.

Based upon the verified complaint, the district court issued a "Warrant of Arrest In Rem and Seizure", on October 23, 1990, and on October 24, 1990 the United States Marshall seized and arrested the premises of 31 Endless Street, Martinsville, Virginia. The Browns filed a "Claim of Interest in Real Property" on November 2, 1990, and asserted their record ownership of 31 Endless Street, and further claimed their right to defend against the forfeiture.

On November 20, 1990, the Browns answered the complaint for forfeiture by denying the essential factual allegations of the complaint and asserting their good faith and lack of knowledge of anyone's involvement in illicit

drugs in any connection to 31 Endless Street.

On February 18, 1992, trial was held, without a jury, the Honorable Jackson L. Kiser, District Judge, presiding. Judge Kiser made oral findings at trial. Judge Kiser acknowledged his duty to make findings of fact and conclusions of law. He discounted the testimony tending to show a "direct connection", or participation, in the sales by Mr. and Mrs. Brown. Judge Kiser found that Mr. Barnwell had been contradicted, and other serious flaws in his testimony, no doubt, motivated Judge Kiser to discount evidence of the Browns' direct participation. His oral findings were grounded on the twenty or twenty-one sales Barnwell recounted together with the pattern by one Mr. Mease and others to enter the house and return with drugs. This is circumstantial evidence, according to Judge Kiser, that the sellers did not carry dope on their persons. The cocaine was likely either cut in the house or stashed somewhere inside.

The same pattern recurred and the house is thereby connected, according to Judge Kiser.

Although acknowledging that Barnwell was impeached, and refusing to find a direct connection between Evelyn and Roosevelt Brown and the sales, Judge Kiser opined that there was so much activity, over time, at the house that "they could not close their eyes to it. I have no reservation that they knew what was going on at their house; that drugs were dealt from the house." (A[17]) Judge Kiser stated that both points are covered; i.e., 1) that the house was used to sell drugs, and that 2) the Browns knew the house was so used, "and that's all that's necessary to forfeit the house to the government...I will so find." He further held that "...the claimants have no claim to it [the home] because...they knew what was going on and of course had the power to stop it." (A[17])

There was no finding setting forth the specific violation of Title 21, U.S.C., Section

881 et seq., or that the Title 21 violations were punishable by more than one year's imprisonment, as required to forfeit the house under Section 881 (a)(7).

The Assistant United States Attorney told the Court that the case law "across the country requires a finding of fact of both knowledge and consent on the parties.... Is there a specific finding of fact regarding consent or not having done anything to prevent the illegal use of the property as to knowledge?" The Court: I will be more specific in a written finding of fact." Mr. Sorenson: "Thank-you, your Honor." (A[19])

The court never made a specific written "consent" finding of fact, although Judge Kiser agreed with the plaintiff that he must, and will, do so. In his Decree of Forfeiture, Judge Kiser explicitly based his decision on "the finding of fact and conclusions of law stated in the record." His "consent" finding on page 2 of the Decree of Forfeiture is thus a legal

conclusion adopted verbatim from plaintiff's proposed decree, and not derived from his oral record findings. Petitioners suggest that more is required.

On March 24, 1992, Judge Kiser entered a Decree of Forfeiture forfeiting the subject real estate to the United States and extinguishing all right, title, and interest of both Roosevelt Brown and Evelyn Brown. From this decree the Browns appealed to the United States Court of Appeals for the Fourth Circuit.

On September 27, 1993, after petitioners and respondent timely filed briefs, oral argument was heard before Justice Powell, Associate Justice (Retired), United States Supreme Court, sitting by designation, Circuit Judge Wilkinson, and Circuit Judge Williams of the Fourth Circuit Court of Appeals. In oral argument, due to the intervening decision of this Court, Austin v. United States, __ US ___; 113 S.Ct. 2801; 125 L.Ed.2d 488 (1993), petitioners' argued, in addition to the errors

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asserted in their brief (which include those complained of in Argument I, infra.), that the case should be remanded to determine the proportionality of the forfeiture under the excessive fines clause of the Eighth Amendment. On November 2, 1993, the Fourth Circuit affirmed the forfeiture, and declined to address the proportionality question on the ground that the issue was not raised at trial and, therefore, petitioners had waived the issue, citing United States v. Davis, 954 F.2d 182,187 (4th Cir. 1992). (Op. p.4,fn 2; A[4].)

Despite confusion in the record over the standard applied by the district court to determine whether the Browns did enough to resist or stop the drug sales, Justice Powell, for the panel, wrote that the Browns did not meet their burden to "take all reasonable steps to prevent illicit use of the premises once one acquires knowledge of that use ...," citing United States v. 141st St. Corp., 911 F.2d 870, 879 (2d Cir. 1990), cert. denied 498 U.S. 1109

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(1991); and United States v. 1966 Beechcraft Aircraft Model King Air A90, etc., 777 F.2d 947, 951 (4th Cir. 1985), which applied a similar definition of consent for purposes of forfeiture under 21 U.S.C. §881(a)(4). (Op. §IV, pp 6-7, A[6]-A[7].) The trial court applied the standard proposed by the government, that the property owner must do "all in your power" to stop the sales.

Petitioners here argue that the court applied the wrong and harsher standard and that, contrary to the Fourth Circuit, which opined that the Browns took no steps to prevent the illicit use of the property during the criminal investigation, the trial court's decision lacked the required findings on whether the Brown's took whatever steps they reasonably could in the circumstances, to stop the sales. See Argument I(A), infra.

Finally, pertinent to this petition, Justice Powell held that the failure of proof and finding that the violations of Title 21

carry penalties of greater than one year are not error since the Browns do not allege that correction of these omissions would change the result. (Op. §VI, p.8, A[8].)

A motion for Rehearing was denied by order filed November 29, 1993. From the adverse ruling below, the Browns petition for a writ of certiorari.

ARGUMENT I

I. **THE TRIAL COURT WAS REQUIRED AND FAILED TO MAKE FINDINGS :**

[A] **THAT THE BROWNS CONSENTED TO THE ILLEGAL DRUG SALES ON THEIR PROPERTY AND DID NOT TAKE REASONABLE MEANS TO STOP THEM.**

[B] **THE ILLEGAL ACTIVITY WAS FOR A VIOLATION OF TITLE 21 WHICH CARRIES A PENALTY OF GREATER THANONE YEAR.**

[A] Consent and reasonableness standard

Even if a claimant has knowledge, in this case of the several drug transactions on and around the Browns' property, the forfeiture may still be defeated if the Browns did not consent

to these sales. United States v. 7715 Betsy Bruce Lane, 906 F.2d 110 (4th Cir. 1990); United States v. On Leong Chinese Merchants Association Building, 918 F.2d 1289 (7th Cir., 1990).

The first issue is the meaning of "consent" on which claimants have a burden to prove, by a preponderance of the evidence, that they did not consent to these drug sales. Government counsel, in his February 16, 1992 letter to Judge Kiser, wrote that "consent has been defined as failure to do all in your power to prevent the illegal use of the property once you have knowledge of the violations," citing United States v. 141st Street Corporation, 911 F.2d 870 (2nd Cir., 1990)[emphasis added]. Petitioners urge that a lesser standard than "all in your power" is the proper one. Petitioners agree with Justice Powell that the standard should be whether "reasonable steps" were taken to prevent drug sales, but disagree that the failure to employ this standard is not

error by the trial court. (OP.7, A[7]-A[8])

In United States v. 141st Street Corp, the trial court instructed the jury that for an apartment building owner to avoid forfeiture, where drug selling was taking place, the owner had to prove either no knowledge of the drug activity or no consent to it. The court further instructed the jury that: "once an owner or his agent is on actual notice of illegal conduct involving the owner's leased property the owner has a duty to do all that reasonably could be expected to prevent the illegal use of its premises. It is for you to decide using your common sense what actions would have comprised a reasonable response by a landlord to prevent the illegal use of its premises". [emphasis added] Id. at 877. The Second Circuit, in approving this instruction, wrote that "once an owner has knowledge, he gives his consent to the narcotics activity unless he then does all that reasonably could by expected to prevent further illicit use of

the premises." Id.

In the case sub judice, Judge Kiser, to the extent that he may have made an implicit consent finding, was in error to adopt the government's "all in your power" standard. His oral findings included that the Browns "knew what was going on and, of course, had the power to stop it." A[17] Judge Kiser made two critical mistakes. First, he regarded the Browns' power to stop the sales as self-evident. Nowhere does he opine what it is he believes they had the power to do, and the record is not illuminative. Second, he should have considered the Browns' actions in light of the "reasonable response" standard, or the need to do "all that could be reasonably expected" of a homeowner in a high crime area to prevent the illegal use of their premises.

The Browns changed the locks when it was alleged, in the civil in rem proceeding, that their house had been used to facilitate drug trafficking. That might prevent "shirt-tail"

relatives and acquaintances from walking in and out. Should they have also kept their house "off-base" to their children, grandchildren and friends? Should they "excommunicate" these people? Should they hire private police to search everyone who enters or leaves the premises? Should they have locked their house like a fortress and refused entrance to their own family and relatives? Should they cease all hospitality? Should they have patrolled the open carport and street which adjoins their house, an altogether dangerous activity in this neighborhood? Should they have run all strangers off the street with presentation of firearms? Should they have erected a barbed fence around their home, which would here perforce include post holes in the adjoining public street? In short, should they have similar obligations as the landlord in 141st Street Corp., to protect tenants and provide a safe environment? What they should have done is never suggested by the trial court which

merely, and erroneously, held that the claimant's knowledge of drug sales is "all that's necessary to forfeit the house to the government." A[17] In short, it makes a great difference, in these circumstances, whether an "all in your power" or "reasonable response" standard is used. Unfortunately, Judge Kiser neither articulated nor employed either formulation.

A landlord at least can lock the doors and give only tenants the keys. The tenants are the close analogy to the Browns rather than the apartment owner in 141st Street Corp., and Endless Street is like the halls of the apartment building. Suppose the apartments are condominiums owned by the occupants. Should those owner-occupants undertake the dangerous task of patrolling the halls which are the exact analogy to Endless and Massey Streets? Should they kick their own children, whom they suspect of selling drugs to friends inside the condominium units, into the halls? If such

requirements are reasonable, then no man and woman should own a home in the ghetto because their children who visit or stay there, and who may become involved in the drug business, expose their parents to loss of their home. Those who choose, or perforce, live in high crime areas would become guarantors of lawful activity by others. The vast majority of drug sales, including those by two of the Browns' children, took place outside the residence and completely off the property. The Browns' knowledge of these street sales by their children, or relatives, or acquaintances, or strangers should not compel them to become the neighborhood's vigilantes. This is especially true here where the trial court declined to find, despite the government's attempt to prove otherwise from the unreliable informant, that the Browns were actively involved themselves in the drug transactions.

There are circumstances, as in this case, where even no action may be reasonable. The

wisdom of United States v. Stop Six Center, 781 F. Supp. 1200 (N.D. Tex, 1991) is instructive wherein the court wrote that "an owner who does not condone illegal activity on his property, but is nevertheless unable to control it through reasonable means, should not automatically acquire criminal status" in a forfeiture action. Id, at 1208, fn. 5 "Although the innocent owner who is aware of drug-related activity on his property must affirmatively demonstrate his lack of consent, the court cautions that reasonableness limits the burden. The Court does not expect the common land owners to eradicate a problem which our able law enforcement organizations cannot control." (Id. at 1209, f.n.6) The Browns did not take affirmative action to stop the sales when Mrs. Brown was indicted. She was presumed innocent, and that presumption was validated by her acquittal. However, when this later civil action was taken against their home, the Browns were put on notice of the illegal activity, and

they took what action they reasonably could. Roosevelt Brown changed the locks upon learning of the petition and its allegations that drug deals may have actually occurred on his property. There is no proof that prior to that time, even the Browns' knowledge of indictments against some of their relatives informed them that alleged sales occurred on their property, as distinguished from in the street or neighborhood. The action they took was reasonable. What else should have been reasonably done, in these circumstances, is unstated by the courts below. And if there is something reasonable, non-dangerous, and preserves the family bonds, the remedy is no more than hindsight.

The test of reasonableness was met, considering all the circumstances faced by Mr. and Mrs. Brown. At minimum, Judge Kiser should have considered their acts and omissions in light of the proper standard of reasonableness, rather than the heroic measures contemplated in

the "all in your power" standard. Further, the court concluded in the total absence of record support, that "of course" they could stop the sales. This finding, of course, could only be grounded on the Browns using "all power" to stop the illegal activity. The proper standard, however, is reasonableness. This court should clearly establish that standard and remand this case to the district court to consider it. Only then will the serious interest in one's home, which this court found to be fundamental in Austin, be protected.

[B] No proof or finding of statutory requirement that criminal penalty exceeds one year

Judge Kiser's oral findings are silent on whether the proof established a violation of some portion of Title 21 of the United States Code, or that the transactions occurring in connection with 31 Endless Street are for crimes punishable by more than one year

imprisonment as required by Title 21, United States Code, Section 881 (a)(7). Although the Fourth Circuit agreed that "a specific finding would have been preferable," it held "the failure to make one does not amount to reversible error in this case" because "the Browns do not allege that correction of the omission by the district court would change the result," so "we see no need to remand." (Op. 8, A[8]). Thus, a finding that the fundamental and jurisdictional basis for the in rem forfeiture proceeding is held to be unimportant and unnecessary.

Respectfully, it is not the Browns' burden to prove that their house was, or was not, subject to forfeiture by a connection to Title 21 offenses. There was no proof or finding either that the drug sales were violative of Title 21, or that the sentence for conviction of the offenses could exceed one year. In the absence of such proof or findings, the Browns should not be compelled to demonstrate that the

sales were outside the statute's proscription before the government takes their home. Moreover, in the absence of proof, remand is unnecessary. The forfeiture should simply be reversed, dismissed, and final judgment entered. If the Court of Appeals is correct that the Browns fundamental right to freedom from excessive fines has been procedurally defaulted (see Argument II, infra.), then a fortiori the government is procedurally defaulted from denuding the Browns of their home when the proof and court findings do not even establish violations of Title 21.

ARGUMENT II

THE FAILURE OF THE BROWNS TO RAISE THE ISSUE AT TRIAL THAT THE FORFEITURE VIOLATED THE EXCESSIVE FINES CLAUSE OF THE EIGHTH AMENDMENT IS NOT A FATAL PROCEDURAL DEFAULT TO THE CONSIDERATION OF THE ISSUE ON APPEAL, AND THEREFORE, THE CASE SHOULD BE REMANDED TO THE TRIAL COURT FOR FINDINGS ON THE ISSUE OF PROPORTIONALITY OF THE FORFEITURE TO THE OFFENSES COMMITTED, AND THE INVOLVEMENT OF THE BROWNS IN LIGHT OF THIS COURT'S OPINION IN AUSTIN V.UNITED STATES, 113 S.CT. 2801

(1993), HOLDING THAT THE CLAUSE APPLIES TO FORFEITURES UNDER 21 U.S.C. §§ 881(a)(4) AND (a)(7).

The Court of Appeals declined to consider whether the forfeiture of the Browns' house is proportional to the offenses committed within the home and its vicinity, and the conduct of the Browns in relation thereto, under the Eighth Amendment's prohibition of excessive fines. (Op.4,fn.2;A[4]) This Court's decision in Austin v. United States, 113 S.Ct. 2801 (1993), a case of first impression, holding this prohibition applicable to civil forfeitures under 21 U.S.C. §§ 881(a)(4) and (a)(7), postdated the Browns appeal and predated oral argument during which Browns' counsel raised the issue and sought a remand for its consideration. The court deemed the issue waived, citing United States v. Davis, 954 F.2d 182, 187 (4th Cir. 1992).

Davis rejected a claim by a criminal appellant who sought review of his sentence

because, under the treaties and statutes of the United States, he could not be tried for crimes other than those named in the extradition order entered by the court of the country (Israel) which agreed to his extradition for trial in the United States. The Fourth Circuit reiterated the "accepted rule of appellate procedure that ordinarily an appellate court will not consider an issue not raised in the court from which the appeal is taken. (citation omitted) While this rule is 'not inflexible' and will be relaxed to prevent 'manifest injustice', such circumstances have generally been held to exist only when fundamental rights are involved." Davis, 954 F.2d at 186. The defendant's claim of "violation of the principle of specialty "merely arose under the rights granted by treaty or statutes and therefore "does not give rise to the level of fundamentality that this court has traditionally demanded before addressing a question of law not argued at the district

court level." Id. at 186-187.

Browns' claim that this forfeiture will leave them "homeless" arises out of a higher order of the law; namely, the Constitution of the United States; than the treaty and statutes in Davis. The excessive fines clause is a fundamental protection for citizens. The Browns' trial counsel would have been clairvoyant to predict the application of this right against excessive criminal punishment to a civil in rem forfeiture. They can be excused from failure to raise the issue at trial.

It is manifestly unjust to refuse appellate consideration to the Browns' claim, and the retroactive application of Austin, where there appears a serious question whether the forfeiture of the Browns' home in which they have lived for decades is commensurate with the sales of very small amounts of drugs by Browns' children and others, mostly in the street which adjoins the house, in a crime infested neighborhood wherein the Browns find

themselves unfortunate and probably helpless denizens, and in a case where the trial judge, although concluding that the number of transactions suggested that the Browns knew of the activity, explicitly refused to find a direct connection between the Browns and the sales. No profiting by the Browns was proven, and, at worst, any participation by the Browns, if the court had instead found them connected to the trafficking, was minimal.

The remedy sought on this issue is remand, not dismissal of the proceeding. The government will suffer no great burden by consideration of proportionality by the trial court, and justice will be done to the Browns' fundamental rights, and to this Court's holding in Austin by a remand.

CONCLUSION

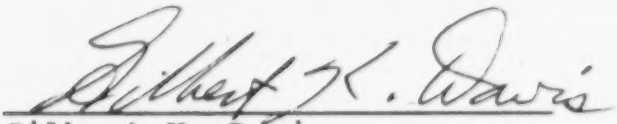
The granting of this petition is important for the guidance of the lower courts in the trial of in rem forfeitures in their determinations of proportionality, and for the articulation of proper standards to consider in the application of the powerful forfeiture remedy in the fight against illicit drugs. The fine should fit the crime, and the citizens should not have their habitation snatched from them without clear enunciation of proper findings.

The issues raised herein are worthy of full review and decision, and for the arguments advanced, the forfeiture should be reversed and

final judgement for failure of proof and findings of the requirements of Title 21; or alternatively, the case should be remanded for proper findings, under the proper standards.

Respectfully submitted,

EVELYN BROWN and ROOSEVELT BROWN



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UNPUBLISHED

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

ALL THAT LOT OR PARCEL OF LAND LOCATED AT 31 ENDLESS STREET, MARTINSVILLE, VIRGINIA, WITH ALL APPURTENANCES AND IMPROVEMENTS THEREON, ANY AND ALL OF PROCEEDS FROM THE SALE THEREOF,
Defendant-Appellant,

ROOSEVELT BROWN; EVELYN BROWN,
Claimants-Appellants.

No. 92-1609

Appeal from the United States District Court
for the Western District of Virginia, at Danville.
Jackson L. Kiser, Chief District Judge.
(CA-90-52-D)

Argued: September 27, 1993

Decided: November 2, 1993

Before POWELL, Associate Justice (Retired), United States Supreme Court, sitting by designation, and WILKINSON and WILLIAMS, Circuit Judges.

Affirmed by unpublished opinion. Justice Powell wrote the opinion, in which Judge Wilkinson and Judge Williams joined.

COUNSEL

ARGUED: Gilbert Kenneth Davis, GILBERT K. DAVIS & ASSOCIATES, Fairfax, Virginia, for Appellant. Kenneth K. Sorenson, Assistant United States Attorney, Roanoke, Virginia, for Appellee. **ON BRIEF:** E. Montgomery Tucker, United States Attorney, Richard A. Lloret, Assistant United States Attorney, Roanoke, Virginia, for Appellee.

Unpublished opinions are not binding precedent in this circuit. See I.O.P. 36.5 and 36.6.

OPINION

POWELL, Justice:

This appeal arises from an *in rem* forfeiture action brought by the United States against All That Parcel of Land at 31 Endless Street, Martinsville, Virginia ("the Property"). Roosevelt and Evelyn Brown ("the Claimants") are the owners of the Property. After a bench trial, pursuant to 21 U.S.C.A. § 881(a)(7) (West Supp. 1993), the district court entered a Decree of Forfeiture, which the Browns challenge here. We affirm.

I.

The Martinsville Police Department began an investigation into cocaine trafficking on the Property on March 20, 1990. Pursuant to the information gathered from this investigation, on October 23, 1990, the United States filed a Verified Complaint for Forfeiture *in rem* pursuant to 21 U.S.C.A. § 881(a)(7).[1] In response, Roosevelt and Evelyn

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[1]Subsection 881(a)(7) provides in part that the following shall be subject to forfeiture:

> All real property . . . which is used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, a

Brown filed a Claim of Interest on November 2, 1990, and an Answer to Complaint on November 20, 1990. With the permission of the district court, the United States filed an Amended Complaint on December 11, 1991, adding allegations of drug activity on the Property subsequent to the original complaint. The Browns answered and denied the allegations of the amended complaint.

The district court held a bench trial on February 18, 1992. The United States had the initial burden of proving probable cause to believe that the Property was used to facilitate felony drug activity. *See* 21 U.S.C.A. § 881(d) (incorporating 19 U.S.C. § 1615 (West 1980 & Supp. 1993)). On appeal, the Browns do not claim that there was a lack of probable cause.

The burden then shifted to the Browns as claimants to rebut probable cause or to prove an affirmative defense by a preponderance of the evidence. *Id.* Claimants "must prove that the property was not unlawfully used or that [they] did not know about or consent to the illegal use." *United States v. 7715 Betsy Bruce Lane*, 906 F.2d 110, 111 (4th Cir. 1990) (citing *United States v. Premises and Property at 4492 South Livonia Rd., Livonia, N.Y.*, 889 F.2d 1258, 1267 (2d Cir. 1986)). The Browns claimed that they were "innocent owners"—that they lacked knowledge of the illegal use or did not consent to it. *See* 21 U.S.C.A. § 881(a)(7). After the Browns asserted an "innocent owner" defense, the United States presented rebuttal testimony to prove that the Property was used to facilitate drug violations, that the Claimants knew of the violations, and that they failed to take reasonable steps to prevent the violations on the Property.

The Browns also contended at trial that there was no substantial connection between the Property and the drug transactions. The government bears the burden of proving by a preponderance of the evi-

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> violation of this subchapter punishable by more than one year's imprisonment, except that no property shall be forfeited under this paragraph, to the extent of an interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner.

21 U.S.C.A. § 881(a)(7).

dence that the Property was "substantially connected" to the underlying criminal activity. *United States v. Santoro*, 866 F.2d 1538, 1542 (4th Cir. 1989) (citing *United States v. All Those Certain Lots*, 657 F. Supp. 1062, 1065 (E.D. Va. 1987)); *see United States v. 1966 Beechcraft Aircraft Model King Air A90, etc.*, 777 F.2d 947 (4th Cir. 1985) (applying "substantial connection" test to forfeiture under 21 U.S.C.A. § 881(a)(4)).

Following the bench trial, the district court made oral findings of fact and conclusions of law on the record. Subsequently, the district court issued a Decree of Forfeiture, filed March 24, 1992, forfeiting the Property to the United States. The Browns raise several challenges to the forfeiture.[2]

II.

The Browns contend that there was insufficient proof to show that the Property was substantially connected to drug transactions. We review the Browns' challenges to the sufficiency of the evidence to support the factual findings of the district court under the "clearly erroneous" standard set forth in Fed. R. Civ. P. 52(a). *Anderson v. Bessemer City*, 470 U.S. 564, 573-76 (1985). Whether a substantial connection exists between the Property and the drug transactions is a mixed question of law and fact. *United States v. Real Property & Residence at 3097 S.W. 111th Ave., Miami, Fla.*, 921 F.2d 1551, 1555 (11th Cir. 1991).

The district court found that "it is beyond almost any question, based on the twenty or twenty-one episodes testified to by Mr. Barnwell, [a part-time undercover agent for the Alcoholic Beverage Control Board,] that the pattern ... was not to carry the drug on their person, but to go into the house and either to cut it or have it stashed

[2]In addition to the grounds of error discussed in the text, at oral argument the Browns raised a proportionality claim pursuant to the Excessive Fines Clause of the Eight Amendment. *See Austin v. United States*, 113 S. Ct. 2801 (1993) (holding that the Clause applies to forfeitures under 21 U.S.C.A. §§ 881(a)(4) and (a)(7)). We do not reach the merits of this argument because the Browns did not raise it before the district court. *See, e.g., United States v. Davis*, 954 F.2d 182, 187 (4th Cir. 1992).

some place." App. at 146. The district court added that "this brings the house right squarely into play in the situation." App. at 146-47. Moreover, it found that "[t]he amount of activity that emanated from the house I think without question shows that the house was used in connection with a—with several, with many illegal drug transactions." App. at 147.

Based on our review of the record, ample evidence supports the district court's factual findings. Agent Francis Barnwell testified that he made approximately twenty-one purchases of cocaine on the Property between March 20, 1990, and August 10, 1990, as part of the investigation. In most of these purchases, according to Barnwell's testimony, he would approach someone outside the house and request to buy cocaine. The person from whom he requested cocaine would go inside the house, return with cocaine, and sell it to Barnwell. This evidence supports the conclusion that the Property was "substantially connected" to the drug violations. *Santoro*, 866 F.2d at 1542 (holding that repeated use of property for drug activity suffices to prove a substantial connection).

III.

The Browns further claim that there was insufficient evidence to support a finding that they both had knowledge of the drug transactions, and that the district court failed to make a finding that they each had actual knowledge. *See id.* at 1544-45. We disagree.

The district court found that "they [the Browns] could not close their eyes as to what was going on there, and this went on for such a long period of time, I have no reservations that they knew what was going on in their house, knew that drugs were being dealt from that house." App. at 147. Thus, the district court found that both of the Brown's had actual knowledge of the drug transactions on their property. Support exists in the record for this finding.

According to agent Barnwell, Evelyn Brown expressly gave the "okay" for a sale on May 24, 1990. On that date, Barnwell approached Larry "Truck" Belcher (Evelyn Brown's son), who was on the carport to the house. Barnwell offered to trade eight cartons of cigarettes for one-half gram of cocaine. Belcher went inside the house through the

carport door. When he returned, Belcher was followed by Evelyn Brown, who stood at the screen door and looked at the proffered cigarettes. After she said "okay," Belcher traded Barnwell cocaine for the cigarettes.[3]

Barnwell also testified that another sale occurred in front of both Evelyn and Roosevelt Brown. On June 15, 1990, Barnwell arrived at the Property to purchase cocaine. The Browns were having a fish-fry in the carport. Barnwell approached Larry Belcher and asked for one-half gram of cocaine. Belcher went inside the house, returned with cocaine, and sold it to Barnwell while Barnwell was seated next to Roosevelt Brown. Barnwell testified that Roosevelt looked down at Barnwell's hand, in which Belcher dropped the package of cocaine, and then looked forward. Barnwell also testified that Evelyn Brown was standing nearby frying fish. She "kept her eye" on Barnwell, but continued to fry fish.

Accordingly, based on our review of the record, the district court's finding that each of the Browns had actual knowledge of the illicit activity was not clearly erroneous.

IV.

The Browns further contend that there was insufficient evidence for the district court to find that they consented to the drug transactions. *see United States v. 141st St. Corp.*, 911 F.2d 870, 877-78 (2d Cir. 1990) (citations omitted), *cert. denied*, 498 U.S. 1109 (1991); *Betsy Bruce Lane*, 906 F.2d at 111, and that the district court applied the wrong legal standard in assessing consent. It is unclear from the record what standard the district court applied. Regardless of the standard applied, the Browns did not meet their burden of proof.

[3]Based on the investigation, Evelyn Brown was indicted for aiding and abetting the sale of cocaine. Although she was acquitted of this charge, the government may still prevail in a civil forfeiture action. Conviction, or even indictment, of the underlying criminal offense is not required for civil forfeiture. *See Betsy Bruce Lane*, 906 F.2d at 111-12 (citations omitted).

Consent, for the purposes of § 881(a)(7), is "the failure to take all reasonable steps to prevent illicit use of premises once one acquires knowledge of that use . . . ." *141st St. Corp.*, 911 F.2d at 879; *see 1966 Beechcraft Aircraft*, 777 F.2d at 951 (applying similar definition of consent for purposes of forfeiture under § 881(a)(4)). There is no evidence that the Browns took any steps to prevent the illicit use of their property during the months of the 1990 investigation, the time period in which the district court found that they had knowledge of the drug transactions. The only evidence that the Browns attempted to prevent the illicit use of the Property was that they changed the locks on the house. They did not take this step, however, until several months prior to the forfeiture trial in February of 1992 — at least a year after the initial complaint in this action was filed in November of 1990. This evidence is insufficient to prove lack of consent.

V.

The Browns also claim that the district court did not make a finding that they had consented to the use of the Property to facilitate the drug transactions. Under Fed. R. Civ. P. 52(a), the trial court need not "'make findings on all facts presented or to make detailed evidentiary findings: if the findings are sufficient to support the ultimate conclusion of the court they are sufficient.'" *Darter v. Greenville Community Hotel Corp.*, 301 F.2d 70, 75 (4th Cir. 1962) (quoting *Carr v. Yokohama Specie Bank, Ltd.*, 200 F.2d 251, 255 (9th Cir. 1952)).

In its oral findings, the district court stated that "the house is forfeited to the government, and that the claimants have no claim to it because of their—they are not innocent claimants; they knew what was going on and of course had the power to stop it." App. at 147-48. The district court's written order, the Decree of Forfeiture, stated that the Property "was used, with the full knowledge and consent of Claimants Roosevelt and Evelyn Brown, to facilitate the commission of violations of Title 21 U.S.C. §§ 801 et seq." App. at 6. The Browns claim that the written order is insufficient, in part because the district court adopted this language from a proposed decree submitted by the attorney for the United States.

By stating in his oral findings that the Browns knew that the drug transactions were occurring and had the power to stop them, the dis-

trict court implicitly found that they did not take reasonable measures to stop them. Moreover, the district court made an explicit finding of consent in its Decree of Forfeiture. Although the language may have originated in the government's proposed version, the district court adopted the language as its own, and its written findings were based on, and supported by, its oral findings. Accordingly, we find no error.

VI.

Finally, the Browns assert that the district court failed to make findings that a violation of Title 21 had occurred, and that such violation carries a penalty of greater than one year. These arguments are unavailing.

As to the first contention, the district court stated in it oral findings that "the house was used in connection with a — with several, with many illegal drug transactions." App. at 147. Although its oral findings did not specifically mention Title 21, its written Decree of Forfeiture specifically found facilitation of "the commission of violations of Title 21 U.S.C. §§ 801 et seq." App. at 6. Rule 52(a) requires no more.

The district court did not note specifically that the violations carried penalties of greater than one year. Although a specific finding would have been preferable, the failure to make one does not amount to reversible error in this case. *Cf. Darter*, 301 F.2d at 75 (stating that "whether findings of fact are sufficient depends . . . of course, upon the particular facts of each individual case"). The Browns do not contend that the drug violations about which Agent Barnwell testified, and that the district court found to have occurred, are punishable by less than one year. Therefore, because the Browns do not allege that correction of the omission by the district court would change the result in this case, we see no need to remand.

VII.

Accordingly, for the foregoing reasons, the decision of the district court is

AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED
November 29, 1993

No. 92-1609
CA-90-52-D

UNITED STATES OF AMERICA
Plaintiff-Appellee

v.

ALL THAT LOT OR PARCEL OF LAND LOCATED AT 31 ENDLESS STREET MARTINSVILLE, VIRGINIA, WITH ALL APPURTENANCES AND IMPROVEMENTS THEREON, ANY AND ALL PROCEEDS FROM THE SALE THEREOF;
Defendant-Appellant

ROOSEVELT BROWN; EVELYN BROWN
Claimants-Appellants

ORDER

The appellant has filed a petition for rehearing.

The Court denies the petition for rehearing.

For the Court,

/s/ Bert M. Montague
Clerk

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
DANVILLE DIVISION

UNITED STATES OF AMERICA,
Plaintiff,

v. **Civil Action No. 90-0052-D**

All that lot or parcel of land located at 31 Endless Street, Martinsville, Virginia, with all appurtenances and improvements thereon, any and all proceeds from the sale thereof,
Defendant.

DECREE OF FORFEITURE

This matter having been brought on for trial on the 18th day of February, 1992, the Court having considered the evidence submitted on behalf of the United States of America, by counsel, and the Claimants, Roosevelt and Evelyn Brown, by counsel, it is the decision of this court that, based upon the findings of fact and the conclusions of law stated in the record, the defendant property located on 31 Endless Street, Martinsville, Virginia, with

all appurtenances and improvements thereon, more fully described as follows:

PART of Lot #1 of Subdivision of the property of Peidmont Christian Institute as shown on a map of record in the Office of the Clerk of the Circuit Court of Henry County, Virginia, in Map Book 1, at page 71, said lot fronting 42.5 feet on Endless Street and running back between parallel lines to a distance of 59 feet and being 42.5 feet in the rear;

BEING the same property conveyed to Roosevelt Brown and Evelyn A. Brown, husband and wife, by Deed dated August 28, 1970, from Robert A. Smith and Hattie Smith, husband and wife, and recorded in the Clerk's Office for the Circuit Court, Martinsville, Virginia, in Deed Book 100, Page 208.

was used, with the full knowledge and consent of Claimants Roosevelt and Evelyn Brown to facilitate the commission of violations of Title 21 U.S.C. §§ 801 et seq.

Notice of this action having been published in the Martinsville Bulletin, P.O. Box 3711, Martinsville, Virginia, once a week for three consecutive weeks on November 7, 14 and 21, 1992, and no claimants other then Roosevelt and Evelyn Brown, and Peidmont Van & Truck Accessories, having filed a claim or

answer herein;

IT IS HEREBY ORDERED,ADJUDGED,AND DECREED that the claim and interest of Roosevelt and Evelyn Brown to the defendant property is forfeited to the United States of america pursuant to Title 21 U.S.C. § 881(a)(7) to be disposed of according to law and no right, title, or interest shall exist in any other party.

It is further **ORDERED** that the United States Marshals Service shall dispose of the property according to law subject only to any valid liens or judgments of record prior to the date of seizure, to include the claim of Peidmont Van & Truck Accessories, 304 N. Virginia Avenue, 220 N., Collinsville, Virginia 24078, in the sum of $611.66, which shall be satisfied by the United States Marshals Service at the time the defendant property, is disposed of from the net proceeds from the sale of the defendant property,if any, the net proceeds being the amount remaining after the United States Marshal has paid all expenses

attributable to the seizure, maintenance, forfeiture, and sale of the defendant property.

It is further **ORDERED**, as there has been no waiver of sovereign immunity in the case at hand, that the United States of America is exempt from the payment of state or local taxes on the property from the date of May 24, 1990, the date of the initial illegal acts giving rise to this action, until such time as the property is disposed of. United States v. City of Adair, Iowa, 539 F.2d 1185, 1189 (8th Cir. 1976).

It is further **ORDERED** that a certified copy of this Decree of Forfeiture shall be put to record in the Circuit Court of Martinsville, Virginia, in release of the Memorandum of Lis Pendis previously recorded in the name of the United States of America as grantee and in the names of Roosevelt and Evelyn Brown as grantors.

The Clerk of this Court shall certify copies of this Decree to all counsel of record, and specifically one copy to the United States

Marshals Service, P.O. Box 2280, Roanoke, Virginia 24009 and three copies to Kenneth M. Sorenson, Assistant United States Attorney, P.O. Box 1709, Roanoke, Virginia 24008.

There remaining nothing further to be dine, this action is hereby dismissed and stricken from the docket of this Court.

ENTERED this 24th day of March, 1992.

/s/ Jackson L. Kiser
United States District Judge

instances.

THE COURT: Well, I'll give you ten days to submit the authority and give you ten days to respond.

MR. WILLIAMS: Thank you, Your Honor.

MR. SORENSON: Thank you, your Honor.

THE COURT: Now as to the ---

MR. WILLIAMS: Your honor --

THE COURT: Yes, sir.

MR. WILLIAMS: Are you to address all of them in the ten days?

THE COURT: No, I am going to rule on the other part right now, subject to the pending motion.

I will sat this at the outset, since I have to make a findings of fact and articulate conclusions of law, if necessary I will supplement these findings in writing, but I don't think it will be necessary.

As to a finding of fact, I think it is beyond almost any question, based on the twenty or twenty-one episodes testified to by Mr.

Barnwell, that the pattern which was being followed by Mr. Mease and those that followed him, was not to carry the drug on their person, but to go the house and either cut it or have it stashed some place. I think the circumstantial evidence is overwhelming to the that effect. The same pattern occurred every time it was used, and this brings the house right squarely into play in the situation.

[309]

The amount of activity that emanated from the house I think without question shows that the house was used in connection with a --- with several, with many illegal drug transactions.

The subsequent connection, in the 1991 curb-side, is a lot more tenuous and I think a lot less convincing, but I do think the Barnwell testimony, even though we throw out any direct connection, and Mr. Barnwell was contradicted on the July 7 and one of the other episodes as to the presence of Mr. Brown, but I don't think he was ever contradicted --

impeached, let me put it that way. He was contradicted about the episode at the fish fry.

But even we throw out any direct testimony as to the Brown's involvement, they could not close their eyes as to what was going on there, and this wont on for such a long period of time, I have no reservation that they knew what was going on in their house, knew that the drugs were being dealt from their house.

So I think that covers both points, that the house was used, and that the claimants knew the house was being used, and that's all that's necessary to forfeit the house to the government, and subject to the authority on the motion for -- as to the collateral estoppel, I will so find, that the house is so forfeited to the government, and

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that the claimants have no claim to it because of their -- they are not innocent claimants; they knew what was going on and of course had the power to stop it.

Those will be my findings. If there any post-finding motions to be made, that should be done in writing.

MR. WILLIAMS: May it please the Court, one, I'd ask the Court to withhold any further judgment on that until we have the chance to get that authority, and then I think we would certainly want the court to postpone any execution of its judgment until we have a chance to confer with our clients to see if they want to appeal.

They have not gone any place. This property is not going to any place. I don't think the government is going to be harmed in any way.

THE COURT: I have no problem with that.

And I'm treating this, Mr. Williams -- I said that I would ask for briefs on all the issues, but if you want to make your record as to any post-verdict or my post-articulation of the findings of facts and conclusions of law to get the record for appeal purposes, you may do

so.

MR. WILLIAMS: All right.

THE COURT: But I have made my ruling.

MR. WILLIAMS: All right. Thank you, your Honor.

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MR. SORENSON: Your Honor, it's my understanding that the current status of the case law really across the country requires a finding of fact of both knowledge and consent on the parties.

The Court kind of mentioned that in its order. Is there a way the court can clarify the findings of fact and conclusions of law?

Is there a specific finding of fact regarding the consent or not having done anything to prevent the illegal use of the property as to knowledge?

THE COURT: I will be more specific in a written finding of fact.

MR. SORENSON: Thank you, your Honor.

THE COURT: But I will wait until briefs are filed.

MR. WILLIAMS: All right, Judge, ten days we will get it, and if we decide not to do that we will inform Mr. Sorenson and inform the court and take it from whatever position it is at that time.

THE COURT: All right

Obviously a finding from the bench is not as orderly and well articulated as something in writing could be. So I will wait until I am more apprised of the claimants' position before I do anything further.

MR. WILLIAMS: All right.

THE COURT: lET'S ADJOURN.

(Thereupon at 5:40 p.m. court was adjourned for the day)